BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

THOMAS E. DEMPSEY, SR.	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,063,122
	)	
UNIFIED GOVERNMENT	)	
OF WYANDOTTE COUNTY	)	
Self-Insured Respondent	)	

ORDER

STATEMENT OF THE CASE

Claimant appealed the February 14, 2013, preliminary hearing Order entered by Administrative Law Judge (ALJ) Kenneth J. Hursh. Dennis L. Horner of Kansas City, Kansas, appeared for claimant. David F. Menghini of Kansas City, Kansas, appeared for respondent.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the February 13, 2013, preliminary hearing and exhibits thereto; and all pleadings contained in the administrative file.

ISSUES

At the February 13, 2013, preliminary hearing, claimant requested medical treatment for his left knee. Claimant alleged he injured the knee when, working as a security guard, he misstepped on a stairway and fell, injuring both knees. ALJ Hursh denied claimant's request for medical treatment, stating at page two of his February 14, 2013, Order:

> In all, this looked like an accident and injury that occurred from a neutral risk during an activity indistinguishable from day to day living activities. This type of accident and injury is not considered "arising out of an[d] in the course of employment" according to K.S.A. 44-508. Therefore, the claimant's request for medical benefits is denied.

The sole issue is: did claimant's bilateral knee injuries arise out of and in the course of his employment?

FINDINGS OF FACT

After reviewing the record compiled to date and considering the parties' arguments, the undersigned Board Member finds:

Claimant worked for respondent for 40 years. He first worked as a detective for respondent for 29 years. After being off work for five years, claimant returned to work for respondent as a security guard on September 3, 2002. From 2009 through the date of claimant's accident, he worked in the monitor room. His duties included monitoring 32 security cameras and making rounds in the building. Making rounds entailed ensuring all doors were locked and that all non-employees were out of the building. During the rounds, claimant would walk to all nine floors of the building using the two stairways. There were 205 steps from the monitor room to the top floor and claimant would make three rounds per shift.

On September 10, 2012, claimant was asked to unlock a door on the lobby level that was supposed to be unlocked for a meeting. As claimant was using the stairway, he misstepped with his left leg and felt his left knee buckle. Claimant tried to catch himself with his right leg, but his right knee also buckled and he fell. Claimant walked up the remainder of the steps to the lobby and told another security guard of the injury. Claimant then walked back to the monitor room and called his supervisor at home.

Respondent referred claimant to Wyandotte Occupational Health for medical treatment. Claimant saw Dr. Gary Legler, an osteopathic physician, at Wyandotte Occupational Health. Claimant initially received physical therapy on his right leg, as it hurt more than the left. According to claimant, Dr. Legler ordered MRIs of both knees. However, the record only contains an MRI report concerning claimant's left knee. The left knee MRI revealed tears of the medial and lateral menisci and a chronic tear of the ACL. Dr. Legler recommended claimant be evaluated by an orthopedic surgeon.

Claimant testified that Dr. Alexandra J. Strong, an orthopedic surgeon, operated on his right knee and recommended a left knee replacement. The medical records of Dr. Strong that were placed into evidence are limited to a single visit she had with claimant on November 6, 2012.

At the request of his attorney, claimant was examined by Dr. Edward J. Prostic on January 9, 2013. Dr. Prostic noted that on November 26, 2012, Dr. Strong performed an arthroscopic partial medial and partial lateral meniscectomy of claimant's right knee as well as chondroplasty of the anterior and lateral compartments. Dr. Prostic indicated claimant has torn menisci and osteoarthritis in the left knee. It was the opinion of Dr. Prostic that claimant would require a left total knee replacement.

PRINCIPLES OF LAW AND ANALYSIS

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that right depends.[1] "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act."[2]

K.S.A. 2012 Supp. 44-508(f)(3)(A) states:

> The words "arising out of and in the course of employment" as used in the workers compensation act shall not be construed to include:
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> (i) Injury which occurred as a result of the natural aging process or by the normal activities of day-to-day living;
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> (ii) accident or injury which arose out of a neutral risk with no particular employment or personal character;
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> (iii) accident or injury which arose out of a risk personal to the worker; or
>
> (iv) accident or injury which arose either directly or indirectly from idiopathic causes.

In *Bryant*,[3] the Kansas Supreme Court discussed at length the term "normal activities of day-to-day living." Bryant was working on a service call. He stooped over to grab a tool out of his tool bag. When he twisted back to work on the equipment, he felt a pop or a snap. He experienced a sudden, severe increase of pain in his lower back and the symptoms became significantly worse the next day. Approximately two months later, while working claimant felt an explosive increase in pain when he stooped down or tried to lean over to perform some welding. The Kansas Supreme Court held that Bryant sustained a personal injury by accident arising out of and in the course of his employment. The Kansas Supreme Court stated:

> Although no bright-line test for what constitutes a work-injury is possible, the proper approach is to focus on whether the injury occurred as a consequence of the broad spectrum of life's ongoing daily activities, such as chewing or breathing or walking in ways that were not peculiar to the job, or as a consequence of an event

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[1] K.S.A. 2012 Supp. 44-501b(c).

[2] K.S.A. 2012 Supp. 44-508(h).

[3] *Bryant v. Midwest Staff Solutions, Inc.*, 292 Kan. 585, 257 P.3d 255 (2011).

> or continuing events specific to the requirements of performing one's job. "The right to compensation benefits depends on one simple test: Was there a work-connected injury? . . . [T]he test is not the relation of an individual's personal quality (fault) to an event, but the relationship of an event to an employment." 1 Larson's Workers' Compensation Law § 1.03[1] (2011).
>
> Even though no bright-line test for whether an injury arises out of employment is possible, the focus of inquiry should be on the *[sic]* whether the activity that results in injury is connected to, or is inherent in, the performance of the job. The statutory scheme does not reduce the analysis to an isolated movement[—]bending, twisting, lifting, walking, or other body motions[—]but looks to the overall context of what the worker was doing[—]welding, reaching for tools, getting in or out of a vehicle, or engaging in other work-related activities.[4]

The Board has reviewed a number of appeals where it was alleged a claimant's accident or injury arose out of a neutral risk or the claimant was engaged in a normal activity of day-to-day living. The Board has consistently focused on whether the activity that results in injury is connected to, or is inherent in, the performance of the job.

In *Robles*,[5] claimant had clocked out of work and was walking to her vehicle through a parking lot owned by respondent when she stepped on a piece of hose, sustaining a right ankle injury. The Board Member deciding *Robles* held the accident did not arise out of a neutral risk, nor did it occur as a result of a normal activity of day-today living.

In *Ruebke*,[6] claimant and an associate were preparing to receive a delivery by getting as much as they could out of respondent's back room and stocking the shelves to make room for the new merchandise. Claimant testified that she was on her way to the back room and as she rounded a corner her ankle rolled, causing her ankle to snap and her to fall. Claimant testified that she did not slip, trip or run into anything to cause her fall. The Board Member who decided *Ruebke* found claimant sustained a personal injury by accident arising out of and in the course of her employment with respondent, stating:

> This Board Member finds that claimant has satisfied her burden of proving that the accidental injury in question arose both out of and in the course of her employment with respondent. The turning of the ankle was the prevailing factor causing the injury. This, coupled with the fact claimant's work required her to be on her feet for most of an 8 hour day indicates that claimant's walking at work was more than the normal activity of day-to-day living. The Order of the ALJ is affirmed.

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[4] *Id.* at 595-596.

[5] *Robles v. Braums, Inc. #103*, No. 1,061,870, 2013 WL 485718 (Kan. WCAB Jan. 23, 2013).

[6] *Ruebke v. Sally Beauty Company*, No. 1,060,391, 2012 WL 4763704 (Kan. WCAB Sept. 24, 2012).

This Board Member finds that claimant met his burden of proving that he sustained personal injury by accident arising out of and in the course of his employment with respondent. Specifically, claimant's accident or injury did not arise out of a neutral risk. When claimant misstepped and fell, he was not engaged in a normal activity of day-to-day living. Claimant's job duties included making rounds by walking to check on the building that he was guarding. At the time of the accident, he was on a work-related errand of walking to unlock a door in respondent's building.

By statute the above preliminary hearing findings are neither final nor binding as they may be modified upon a full hearing of the claim.[7] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2012 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.[8]

WHEREFORE, the undersigned Board Member reverses the February 14, 2013, preliminary hearing Order entered by ALJ Hursh, and remands the matter to ALJ Hursh for additional orders consistent with this decision.

IT IS SO ORDERED.

Dated this ____ day of April, 2013.

THOMAS D. ARNHOLD
BOARD MEMBER

c: Dennis L. Horner, Attorney for Claimant
hornerduckers@yahoo.com

David F. Menghini, Attorney for Respondent
dmenghini@mvplaw.com; mvpkc@mvplaw.com

Kenneth J. Hursh, Administrative Law Judge

[7] K.S.A. 2012 Supp. 44-534a.

[8] K.S.A. 2012 Supp. 44-555c(k).